

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of)
SAVE SAN FRANCISCO BAY ASSOCIATION)
for Review of Orders Nos. 82-63)
and 82-64 of the California)
Regional Water Quality Control)
Board, San Francisco Bay Region.)
Our File No. A-327. NPDES)
Permit No. CA 028711.)

ORDER NO. WQ 83-6

BY THE BOARD:

On December 15, 1982, the California Regional Water Quality Control Board, San Francisco Bay Region (Regional Board), adopted Board Order 82-63, NPDES Permit No. CA 0028711 and Board Order 82-64 for the Newby Island solid waste disposal site. This site serves as the City of San Jose's garbage dump. It is operated by International Disposal Corp. of California, Browning-Ferris Industries (BFI or discharger). The discharge permits were issued to BFI. On January 14, 1983, Save San Francisco Bay Association (petitioner) appealed this action.

On April 21, 1983, BFI requested a hearing in this matter for the purpose of opposing the petition and to explain evidence which was before the Regional Board. Since the workshop meeting will afford BFI these opportunities, and as BFI seeks to introduce no new evidence, we hereby deny a hearing.

I. BACKGROUND

Newby Island is located in the South San Francisco Bay area of northern Santa Clara County, adjacent to the City of Milpitas. It covers approximately 342 acres. It is bounded by Coyote Creek on the north and east, and by an unnamed slough on the south and west. In the late nineteenth century, Newby Island was reclaimed from tidal marsh lands by the construction of a perimeter dike system. Until 1930, portions of the Island were used as orchards and pasture land. From 1930 to 1956, part was used as an open burning dump, and a part as a hog farm. In 1956, the open burning dump was converted to a sanitary landfill, while pasturage use continued to 1972. In 1972 Newby Island was acquired by BFI who anticipated using the entire island for a fill and cover refuse site. The present elevation of the unfilled marsh is between -2 and -4 feet. The existing levees range from 7 to 11 feet above mean sea level.

The Regional Board first adopted waste discharge requirements for the site in 1975. Board Order No. 75-22 divided the site into an Area 1 and Area 2. Area 1 was designated as an active disposal site, and Area 2, covering approximately 160 acres, was regarded as a future landfill area. At that time, the issue of whether Area 2 included wetlands was handled by the U. S. Army Corps of Engineers (hereafter Corps) pursuant to Section 404 of the Clean Water Act (CWA) permit authority. In 1975 the Corps' fill regulations included solid waste as fill material. Under current law, however, an NPDES permit must be issued under Section 402 of the CWA for such discharges to wetlands.

On June 16, 1982, the Regional Board adopted Order No. 82-41, revising Order No. 75-22. The Board found that Area 2 was wetlands and that an NPDES permit would be required. Disposal of waste into Area 2 was prohibited, until appropriate mitigation was provided by the discharger. This order was appealed to the State Board by International Disposal Corporation and Browning-Ferris Industries (our file A-314), but the petition has been held in abeyance as the Regional Board proceeded to deal with the wetland mitigation issue. The final result was Regional Board Order No. 82-63. That order found that a portion of the site was wetlands and authorized discharges to the site subject to conditions. One of the conditions required mitigation of the adverse impacts of discharges to the wetlands. Specifically, the discharger was required to acquire and dedicate off-site wetlands areas or to place \$110,000 in a trust account for acquisition and dedication of off-site areas. This figure was based on acquiring 22 acres off-site.

II. ISSUES

Before proceeding to the specific issues presented by the case of Newby Island, it is useful to discuss wetlands and solid waste disposal generally.

The State Board has a responsibility to protect wetlands. Water Code Section 13132.5 in pertinent part sets forth the policy that:

"In addition to any other policies established pursuant to this division, the policies of the state with respect to water quality as it relates to the coastal marine environment are that:

"(a) Waste water discharges shall be treated to protect present and future beneficial uses, and, where feasible, to restore past beneficial uses of the receiving waters. Highest priority shall be given to improving or eliminating discharges that adversely affect any of the following:

"(1) Wetlands, estuaries, and other biologically sensitive sites."

The San Francisco Bay Regional Water Quality Control Board Basin Plan adheres to this policy by stating at 2-8 "The protection and preservation of the remaining marsh communities is essential for maintaining the ecological integrity of San Francisco Bay."

As noted by the petitioner, the Department of Fish and Game, and the U. S. Fish and Wildlife Service, wetlands are disappearing rapidly. According to petitioner, San Francisco Bay has already lost 80 percent of its intertidal marsh. As is discussed later, Congress explicitly recognized the need to protect the remaining wetlands when it passed the Clean Water Act.

There was much testimony before the Regional Board as to the need to use the Newby Island site for solid waste disposal. The City of San Jose spoke to the lengthy process needed to select an alternative landfill site and the current need to use Newby Island. The City of Milpitas also testified to the lack of existing alternative sites.

Another citizen opposed an alternative disposal site which had been proposed in other contexts. The State Waste Management Board stated that the Santa Clara County and the City of San Jose have very real problems in terms of garbage disposal, and few alternatives. The discharger, Browning-Ferris Industries, also discussed the lack of alternative sites.

Following the June 1982 hearing, the Regional Board was faced with two questions: (1) How is wetland defined, particularly at Newby Island, and (2) If discharges are allowed, what is appropriate mitigation? These are the issues currently before us.

1. DEFINITION

As the Regional Board was proceeding under Section 402 of the CWA, the Board used the federal definition of wetlands found in 40 CFR 122.3 (Environmental Protection Agency) and 33 CFR 323(c) (Corps).

"The term 'waters of the United States' means: Wetlands adjacent to other waters of the United States."

"The term 'wetlands' means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similiar areas."
(Emphasis added)

Suffice it to say, controversies over how to apply this definition to individual cases have been legion. Additionally, as pointed out in the Regional Board response to the petition, there are other definitions of wetlands used by state and federal agencies. Therefore it should not have been surprising that the interested parties differed greatly on how much of the Newby Island site should be considered wetlands. The disagreement among the various parties surrounded two issues: (1) What are "normal circumstances", and (2) how is prevalence of vegetation determined?

The Regional Board requested written interpretations from each of the concerned agencies for these terms and received the following:

Environmental Protection Agency (EPA)

EPA noted the historical uses of Newby Island, and stated areas which had received discharges of agricultural and municipal wastes prior to 1972 which had the effect of filling the area so that it could no longer function as wetland, would not be within the Clean Water Act jurisdiction. Any discharges after 1972 would not be considered in a determination of "normal circumstances" unless they were pursuant to a Clean Water Act permit. 1972 is the critical date since that was the year the applicable federal water legislation was enacted. EPA thus recommended that any mitigation be evaluated on the basis of the probable condition of Newby Island as of 1972.¹

Army Corps of Engineers

The Corps uses the same wetland definition as EPA for 404 permits (33 CFR 323.2.). However, the Corps relies on the preamble to these regulations,² to reach the conclusion that "normal circumstances" are to be determined by the actual, present use of an area. If a former wetland area has been converted to another use, it is no longer a water of the United States and thus not under Corps' jurisdiction unless it reverts to wetlands. As garbage is not currently considered fill, most of Area 2 will need no permit from the

¹ See Record, Board Agenda Package - November 17, 1982, letter to Fred Dierker from Frank M. Covington, June 16, 1982; and enclosed memorandum.

² See Record, Board Agenda Package - November 17, 1982, memorandum from Forrest T. Gay, citing 42 FR 37128 et seq.

Corps. The Corps did not address specifically the issue of prevalence of vegetation in determining that it would exercise 404 jurisdiction over 4.39 acres of historic sloughs.

California Department of Fish and Game (DFG)

The State Department of Fish and Game normally relies on the U. S. Fish and Wildlife Service's definition and classification system for wetland identification. The Department concluded that almost all of the expansion area is wetland as it functions biologically as a wetland, and because of seasonal presence of wetland plants, seasonal inundation, and substrate saturation. Fish and Game noted that the area has been disced, removing most of the vegetation, and that therefore a wetland determination based solely on the percentage of aerial coverage by vegetation is inappropriate. Instead, DFG would use the "frequency" concept in applying the "prevalence" criteria. Accordingly, DFG would examine the dominance of a certain vegetation type. This would result in 151 acres of wetlands.

U. S. Fish & Wildlife Service (USFWS)

The USFWS testified that since 1975 the Service has recommended against authorization of any expansion of the Newby Island fill site and that filling should not be permitted under either Section 402 or 404. The Service uses a general biological definition to determine wetlands.³ Its classification system includes three criteria: hydrophytic vegetation, hydric soils and inundation. All three do not need to be present simultaneously, nor

³ See Reporter's Transcript, November 17, 1982, hearing, p.32, as published in "Classification of Wetlands in Deep Water Habitats of the United States".

is a particular percentage of vegetation coverage required. Despite the recent discing activity, the Service feels all of area 2 functions as a wetland.

Browning-Ferris Industries (BFI) (Discharger)

BFI believes that the EPA and Corps definition of wetlands is appropriate. BFI stated that "normal circumstances" existed on Newby Island as of 1982. Citing an October 9, 1980, EPA memorandum, BFI argues that "prevalence" is properly determined by greater than 50 percent coverage. BFI undertook an extensive wetland acreage determination and review based on vegetation and concluded that only 3.45 acres (in area 2) should be regarded as wetland together with 4.39 acres of slough, for a total of 7.84 acres at the present time. Using the same test for vegetation, BFI determined that 22.8 acres of wetland existed in 1972.

Regional Board

The Regional Board utilized the Corps-EPA definition of wetlands. Staff, following the EPA Region IX memorandum, determined wetlands as of 1972, the year of enactment of the Clean Water Act. Based on analysis of vegetation, as shown in infrared aerial photographs the Regional Board found that 33.5 acres of wetland existed. The Regional Board accepted the BFI offer of 22.8 acres of offsite wetland acreage to mitigate the wetlands to be filled on site.

Save San Francisco Bay (Petitioner)

A letter from petitioner was read at the November hearing stating that far more than 33.5 acres should be considered as wetland.

2. APPROPRIATE MITIGATION

The positions of each party concerning the amount of mitigation needed varied according to the contention of amount of wetland. The discharger,

claiming only 7.84 acres of wetland exist, originally offered 11 acres of existing wetland at the site, plus an additional 11 acres offsite in mitigation of the impacts of filling the entire site. The Department of Fish and Game took the position that 75 acres of onsite mitigation is needed if 90 acres are to be filled, or 100 acres of offsite mitigation if all 160 acres are filled. At the December 15, 1982, meeting the Board adopted NPDES Permit CA 0028711, Order 82-63, which allowed the discharge to the 33.5 acres of wetlands in Area 2, with the requirement that 22 acres of offsite area, up to \$5000 per acre be acquired. This 22-acre figure was based on an amended mitigation proposal advanced by BFI at the November 17, 1982, Board meeting. Waste discharge requirements were also adopted in Order 82-64 for discharges to Area 1 and the nonwetland portions of Area 2. If the land was not purchased by August 1983, the money was to be deposited in a trust account.

III. CONTENTIONS AND FINDINGS

Petitioner essentially urges that the Regional Board should have, pursuant to the fish and wildlife agencies' testimony, considered the entire area as wetlands. It accordingly concludes that the proposed mitigation is inadequate. We will address these in turn.

1. How Much of Area 2 of Newby Island Should Properly be Considered Wetlands?

As discussed above, the Regional Board has found that 33.5 acres in Area 2 are waters of the United States and subject to an NPDES permit pursuant to Section 402 of the Clean Water Act. This determination was based on the review of aerial photographs taken during 1972 and 1973. Since Newby Island

has been disced since 1972, the point in time at which wetlands is determined becomes critical.

Prior to the passage of the Federal Water Pollution Control Act (now the Clean Water Act) in 1972, the term "navigable waters" had been defined based on traditional concepts of navigability. In passing the Clean Water Act, Congress intended that the term "navigable waters" be given the broadest possible interpretation. The regulations cited above refer to "normal circumstances". We agree with the EPA position that normal circumstances are those which would exist at a particular site, without human intervention since 1972. We feel this is to be consistent with the Clean Water Act and court cases holding that the term "navigable waters" is to be given the broadest possible constitutional interpretation.⁴ To say that normal circumstances are those which may currently actually exist would give undue weight to the conversion of a wetland area to another use, without sufficient regard to destruction of any aquatic vegetation. Such a restrictive interpretation would also conflict with Water Code Section 13132.5 (see pages 3-4, infra.) We addressed this issue in Order WQ 79-33, In the Matter of the Petition of the Amigos de Bolsa Chica, where the same issue of "normal circumstances" was raised. At p. 6 we stated "It is our opinion that consistent with the spirit and intent of the Clean Water Act, 'under normal circumstances' must be

⁴ See e.g., Leslie Salt Co. v. Froehlke (1978) 578 F.2d 742, 754, and Avoyelles Sportsmen's League v. Alexander (1981) 511 Fed.Supp. 278, 286, and our Order WQ 79-33, In the Matter of the Petition of the Amigos de Bolsa Chica.

interpreted to mean in the absence of interference due to man's activities." We therefore find that the Regional Board properly based its wetland determinations as of 1972.

It is difficult to determine what the wetland acreage was in 1972. As discussed above, wetlands can be determined from a "prevalence of vegetation" adapted for life in saturated soil conditions. While the discharger submitted an extensive analysis of vegetation currently found at the site, the record contains no such inventory of vegetation found in 1972. Again, both the discharger and the Regional Board staff had to rely on the infrared aerial photographs in the record. Based partly on these photographs, the discharger determined that 22.8 acres of wetlands existed in 1972, while the Regional Board found 33.5 acres. We have reviewed the record and agree with the method used by the Regional Board to arrive at the 33.5-acre figure.

We note that this figure of 33.5 acres is considered by some to be too low. Testimony by federal and state agencies directly concerned with habitat and wildlife management indicated far more area may well have been wetlands. The discharger's own expert acknowledged that Newby Island is currently functioning as a wetland habitat.⁵ However, there is insufficient evidence in the record before us, and before the Regional Board, to support a finding of more than 33.5 acres of wetland.

We find that the Regional Board properly found 33.5 acres of Area 2 of Newby Island to be waters of the United States subject to an NPDES permit.

⁵ See Reporter's Transcript, June 16, 1982, hearing, p. 55

2. What Amount of Mitigation is Appropriate for the Filling of Area 2 of Newby Island?

The Regional Board received testimony from a number of parties concerning the amount of mitigation required to offset the filling of Area 2, as discussed above. The Regional Board also received information concerning the approximate cost of purchasing equivalent acreage. Regional Board staff determined an average cost of \$6,250 per acre for purchase and enhancement, however, Browning-Ferris believed a reasonable figure to be \$5,000 per acre.

The petitioner urges that the Regional Board's acceptance of 22 acres as mitigation for the filling of 150 acres is inadequate. Petitioner believes the Regional Board should have agreed with the conclusions and determinations made by the state and federal wildlife agencies. Additionally, petitioner cites the California Environmental Quality Act (CEQA), and the CEQA Guidelines for the proposition that the Regional Board's action fails to prevent significant, avoidable damage to the environment.

The discharger urges that Public Resources Code Section 21001 speaks to "feasible mitigation", which includes economic and social considerations as well as environmental. As pointed out by the discharger, mitigation should be imposed for "significant environmental effects", as defined in 14 Cal.Admin.Code Section 15382:

"Significant effect on the environment' means a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project include land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance. An economic or social change by itself shall not

be considered a significant effect on the environment. A social or economic change related to a physical change may be considered in determining whether the physical change is significant."

While we have found that the record before us does not contain sufficient detail to support a finding of more than 33.5 acres of wetland, the record does contain support for the significant adverse effect on the environment which may occur upon deposit of waste in Area 2. For example, the U. S. Fish and Wildlife Service testified:

"We believed then, and continue to believe today, that all area C on Newby Island is wetland habitat of value to migratory shore birds and water fowl using the Pacific flyway. Filling of this 160-acre site would destroy existing wildlife habitat values and compound the potential for adverse water quality impacts to San Francisco Bay." (Reporter's Transcript, November 17, 1982, p. 30.)

The California Department of Fish and Game testified:

"Expansion into area 2 would result in a substantial impact to the State's resources mainly the loss of wetlands and their associated wildlife species. Mitigation for this loss is required. The Department has made its recommendation for appropriate mitigation as stated in the Staff's report and we urge that approval of any permits include our stated mitigation or comparable mitigation." (Reporter's Transcript, November 17, 1982, p. 36.)

We recognize also that additional mitigation may have an effect on the City of San Jose, and the availability of garbage disposal facilities.

However, since there is expert testimony that more than 33.5 acres of wetland may exist, we feel it is appropriate that the loss of all 33.5 acres be fully mitigated.

The Regional Board found that 33.5 acres of area 2 of Newby Island are wetlands when it issued the NPDES permit, Order 82-63, and the waste discharge requirements, for the site. However, the Regional Board had already determined to accept the acquisition 22 acres of off-site wetland as mitigation at the November 17, 1982, Board meeting. At the November meeting, the Board made no finding as to how many acres of wetland existed. We therefore find that there is an inconsistency between finding 2 of Order 82-63 finding 33.5 acres of wetland, and findings 15 and 17 of the same order which set forth mitigation in the maximum amount of \$110,000 for 22 acres.

Based on the record before us, we do not find that there has been sufficient mitigation for loss of 33.5 acres of wetlands. We will therefore require additional mitigation to compensate for the remaining 11.5 acres. Such mitigation could take several forms including preserving 11.5 acres within the existing site, or placing an additional \$57,500 in the existing trust fund. We further find that any offsite mitigation should be preferably in the form of restoration or enhancement of degraded wetland, so as not to result in a net loss of wetland. Acquiring a parcel of currently functioning wetland means only a change of ownership with no offsetting gain in wetland.

3. Public Trust Claims

The State Lands Commission appeared at the November 17, 1982, hearing and asserted that Newby Island is subject to the public trust easement below the mean high tide line of any tide waters within the area. This issue

has not been resolved. In our review of Orders 82-63 and 82-64 we are expressing no opinion on the existence of any public trust easement, and are leaving to the State Lands Commission any settlement of that issue.

CONCLUSIONS

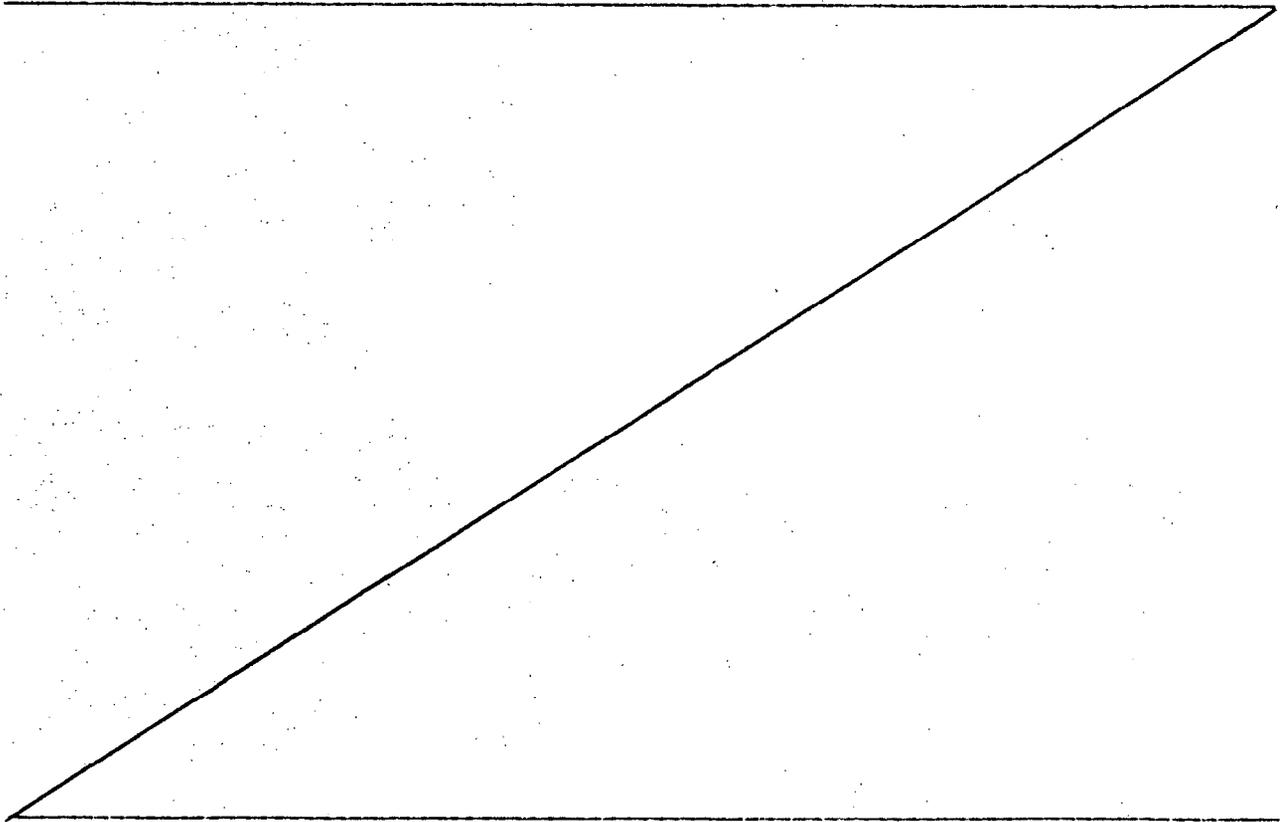
After review of the record and consideration of the contentions of the discharger and the petitioner, and for the reasons discussed, we conclude as follows:

1. The definition of wetland found in 40 CFR 122.3 and 30 CFR 323(c) is appropriate to use when determining what are "waters of the United States" under the Clean Water Act.
2. Consistent with the mandates of the Clean Water Act, this definition and "normal circumstances" should be applied as broadly as possible. In this case, the amount of wetlands should be determined as of 1972, the year of passage of the applicable federal water legislation.
3. The Regional Board properly determined that 33.5 acres of wetlands exist in area 2 of Newby Island.
4. The Regional Board should not have determined what appropriate mitigation was before it determined how much wetland existed. The Regional Board should have required mitigation for filling all 33.5 acres of wetland, not 22 acres.
5. Such mitigation should be imposed so as not to result in a net loss of wetlands.
6. Our review of the Regional Board action is separate and apart from any necessary public trust determination by the State Lands Commission.

ORDER

1. Provision 13 of Order 82-63 NPDES No. CA 0028711 is amended to add the following:

"The mitigation set forth in Finding 15 mitigates the adverse impacts of filling only 22 acres of the 33.5 acres found to be wetlands. Therefore, in addition to the mitigation set forth in Finding 15, the discharger shall also provide mitigation for the adverse impacts of filling 11.5 acres. Such mitigation, to be approved by the Executive Officer of the Regional Board, may take a variety of forms including acquisition and dedication of 11.5 acres offsite, or placing an additional \$57,500 in an appropriate trust fund. Until such mitigation is provided, 11.5 acres of area No. 2 as approved by the Executive Officer of the Regional Board shall be reserved and no fill deposited on that reserved area."

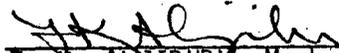


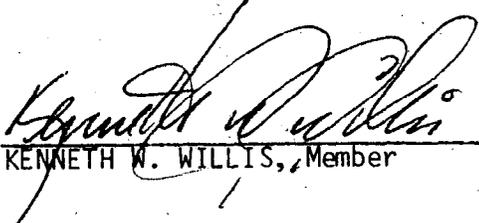
2. The petition of International Disposal Corporation and Browning-Ferris Industries of July 13, 1982, appealing Board Order 82-41 of the California Regional Water Quality Control Board, San Francisco Bay Region, our File No. A-314, is hereby dismissed.

Dated: November 17, 1983


CAROLE A. ONORATO, Chairwoman


WARREN D. NOTEWARE, Vice Chairman


F. R. ALJIBURY, Member


KENNETH W. WILLIS, Member

